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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH ROBERT PROVENZANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was denied a fair trial because the jury was prejudiced by newspaper articles published during the course of the trial.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c); one count of conspiring to engage in racketeering, in violation of 18 U.S.C. 1962(d); five counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of using a facility of interstate commerce to further racketeering activity, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to seven and one-half years' imprisonment and fined $50,000.[1]

The court of appeals described the conduct that was the basis for these convictions by observing that petitioner "was the kingpin of a Louisiana crime organization involved in, among other transgressions, arson, extortion,

[1] The jury acquitted petitioner on two additional counts of using a facility of interstate commerce in furtherance of racketeering.

and mail fraud" (Pet. App. A4). Two of petitioner's co-defendants asked him "to burn down a competitor's lounge, requests resulting in two separate arsons" (*ibid.*). Other co-defendants' requests for assistance from petitioner culminated in arson and other forms of destruction of property (*ibid.*).

On December 5, 1984, the third day of petitioner's trial, an article discussing the trial appeared on the first page of an interior section of a New Orleans newspaper. The article mentioned that petitioner previously had been convicted for assaulting a government witness. Petitioner's counsel brought the article to the district court's attention and requested a voir dire of the jury or, in the alternative, the declaration of a mistrial. The court "delivered a strong, lengthy warning [to the jury] to avoid media coverage of the trial." Pet. App. A13. The court then asked the jurors whether they had read the article in the newspaper. Three jurors responded that they had read the article; those jurors were questioned by the district judge. *Ibid.*

The district judge asked the first juror, Valerie Bailey, whether she had noticed any reference in the article to petitioner's prior conviction. She said that she had not. The judge then questioned the other two jurors without referring to petitioner's prior conviction. Both jurors indicated that they had simply glanced at the article and that it would not affect their impartiality. The district judge returned all three jurors to service and the trial resumed. Pet. App. A13, A14.

The next morning, the district judge and counsel asked juror Bailey whether she had discussed with the other jurors her conversation with the judge. Bailey said that she told the jurors that the judge had asked her about the newspaper article; she stated that she had not discussed the contents of the article with her fellow jurors. The court

then excused juror Bailey at the request of the prosecution, recalled the jury, and again admonished the jurors to avoid all media accounts of the trial. Pet. App. A13-A14.

One week later, on December 12, a second article concerning petitioner's trial appeared in the newspaper; the article again referred to petitioner's prior conviction. The district court denied petitioner's request for another voir dire of the jury, but again cautioned the jury to avoid all news coverage of the trial. Pet. App. A16.

2. The court of appeals unanimously affirmed petitioner's convictions, rejecting petitioner's claim that he was deprived of a fair trial because the newspaper articles influenced the jury (Pet. App. A13-A18).[2]

The court concluded that the exposure of three jurors to the first newspaper article did not deprive petitioner of a fair trial, because none of the three jurors became aware of petitioner's prior conviction as a result of the article. The jurors' "[f]ailure to see reference to [petitioner's] earlier conviction [was] completely understandable," the court of appeals noted, "because discussion of the conviction occupied but one short paragraph in a lengthy article. Other, much more detailed passages chronicling the trial's progression dominated the article." Pet. App. A14.

The court of appeals observed that the district judge had mentioned petitioner's prior conviction during his conversation with juror Bailey and that "[h]er return with knowledge of the conviction gleaned from the judge's questioning created the possibility of jury contamination" (Pet. App. A15). The court found no such contamination, however, because—based upon its review of the record—it concluded that "Mrs. Bailey did not mention the conviction to the other jurors" during the short time that she remained on the jury (*id.* at A16).

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[2] The court of appeals also rejected petitioner's challenges to certain evidentiary rulings made by the district court (Pet. App. A18-A22, A23-A24).

The court of appeals also rejected petitioner's claim that the district court erred by refusing to conduct a second examination of the jury following the publication of the second news article. It stated that a district court must consider two factors in determining whether midtrial publicity requires a voir dire of the jury. First, the court must determine whether the news material in question is "innately prejudicial"; second, the court "must ascertain the likelihood that the publicity has in fact reached the jury" (Pet. App. A16).

The court of appeals found that the article's reference to petitioner's prior conviction was prejudicial but concluded that the chance that the jury was influenced by the news article was "minuscule," because the trial court "had warned the jury against reading about the trial at least twice" before the article was published (Pet. App. A17-A18). The court also noted that the article was not a "headline item," although it did appear on the front page of an interior section, and that "[t]he inadmissible information—the prior conviction—again constituted one small paragraph at the end of the medium-length article" (*id.* at A18). Finally, the court observed that the jury's not guilty verdicts with respect to two of the charges against petitioner "indicates a fair-minded consideration of the case against him. The not guilty verdicts reinforce our belief that the media coverage did not lead to the deprivation of [petitioner's] right to an impartial jury" (*ibid.*).

The court of appeals panel denied petitioner's petition for rehearing and issued a short per curiam opinion addressing the issues raised in the petition (Pet. App. A26-A27).[3] It observed that the district court had failed to follow the procedural guidelines set forth in *United States* v. *Herring*, 568 F.2d 1099 (5th Cir. 1978), relating to claims that a jury has been tainted by midtrial publicity.

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[3] Petitioner's suggestion for rehearing en banc also was denied.

The court of appeals noted that the district court was required to make an inquiry to determine the likelihood that the damaging material has in fact reached the jury. Pet. App. A26. It stated that the voir dire in the present case "fell somewhat short of the neutral kind that *Herring* recommends" because the district judge mentioned petitioner's prior conviction to one of the jurors (*id.* at A27).[4] Although the district judge's actions were for that reason "technically improper," the court of appeals concluded "upon review of the entire record" that the error "was insufficient to constitute grounds for reversal" (*ibid.*).

3. Petitioner renews (Pet. 4-6) his assertion that he was deprived of a fair trial because the jury was influenced by the news articles mentioning his prior conviction. The decision of the court of appeals rejecting this claim is correct and does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound claim is not warranted.

Petitioner plainly is incorrect in asserting (Pet. 4) that "[t]he instant case involves publicity during trial * * * [that] rises to the level of a constitutional violation." This Court has determined that "[t]he constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors' " (*Murphy* v. *Florida,* 421 U.S. 794, 799 (1975) (citation omitted)). The question is whether a juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court" (*Irvin* v. *Dowd,* 366 U.S. 717, 723 (1961)). There simply is no evidence in this case indicating that any of the jurors were biased against petitioner. His constitutional claim therefore must fail.

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[4] The court of appeals also noted (Pet. App. A26-A27) that the district court's instructions to the jury to avoid media accounts of the trial did not conform to its guidelines, but it acknowledged that the district court "did suggest that the jury avoid such information" (*id.* at A27).

This Court has invoked its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts" to reverse a conviction on the ground that the defendant was prejudiced by the jury's exposure to midtrial publicity (*Marshall* v. *United States,* 360 U.S. 310, 313 (1959)). The Court ordered a new trial in that case because the record indicated that seven jurors had read newspaper articles published during the trial reporting that the defendant had previously been convicted of offenses similar to the charges that were the subject of the trial (*id.* at 311-312).

The court of appeals correctly concluded that a similar exercise of supervisory authority is not warranted in the present case. Although three jurors saw one of the newspaper articles, there is no evidence that any of the jurors learned of petitioner's prior conviction as a result of that article.[5] As this Court has observed, the trial court "has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial * * * [and] each case must turn on its special facts" (*Marshall* v. *United States,* 360 U.S. at 312). In view of the absence of any evidence that the jurors learned of petitioner's prior conviction, the district court did not abuse its discretion by refusing to declare a mistrial in this case.

Nor, as petitioner suggests (Pet. 6), should his conviction be reversed because the district court did not strictly follow procedures established by the Fifth Circuit relating to claims of midtrial publicity. See *United States* v. *Herring,* 568 F.2d 1099 (5th Cir. 1978). The district judge's errors were his failure to give the appropriate cautionary instruction and his reference to petitioner's prior conviction

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[5] The juror who became aware of petitioner's prior conviction as a result of the district court's questioning was excused from service on the jury.

during the questioning of juror Bailey. However, the district judge did administer cautionary instructions, and he excused juror Bailey before the prejudicial information spread to other members of the jury. The court of appeals thus correctly concluded that "[r]ehearing of [petitioner's case] would serve no useful purpose" because the trial court's actions were no more than "technically improper" (Pet. App. A26-A27).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[6] Petitioner erroneously suggests (Pet. 6) that the court of appeals' decision rests upon an application of the harmless error doctrine. In fact, as we have discussed, the court of appeals addressed the merits of petitioner's claim and found no evidence of jury prejudice. What the court of appeals found to be harmless was the district court's failure to comply with the procedural guidelines previously established by the court of appeals. Since the district court's deviation from the guidelines was merely "technical," the court of appeals properly declined to reverse petitioner's convictions.

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